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Wilson on Children and the Law

Jeffrey Wilson

Toronto: Butterworths, 1994, looseleaf.

Reviewed by Rhonda Payget†

Canada's National Paper for the World Summit for Children in 1990¹ states that Canada has striven "to achieve a high standard of physical and emotional well-being and economic security for its children."² High ideals that are not supported by 1991 statistics showing 18.3 percent, or more than one million, of Canadian children living below the poverty line.³

Jeffrey Wilson has been writing about children and the law since 1978⁴ and now aspires to provide a complete Canadian service solely devoted to the legal rights of children, including historical background, precedents, strategies, exceptions and contradictions, and judicial and legislative trends.⁵ This is not an easy task as the topic is an amorphous one touching on many areas of law. Hence, Wilson has chosen a looseleaf format with clearly delineated sections, topics and headings. Clearly, the purpose is to provide a practitioner's guide with easily referenced information rather than to engage in a general philosophical discussion around children and the law. From a practical standpoint this is achieved with attention

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¹ *Children of Canada, Children of the World*, (Ottawa: Health and Welfare Canada, Minister of Supply and Services, 1990).

² *Ibid.* at 13.

³ Social Planning Council of Metropolitan Toronto, *Unequal Future: The Legacies of Child Poverty in Canada* (Toronto: Social Planning Council, 1993) quoted in J. Wilson, *Wilson on Children and the Law* (Toronto: Butterworths, 1994) at 4.4.

⁴ J. Wilson, *Children and the Law* (Toronto: Butterworths, 1978); J. Wilson, *Up Against It: Children and the Law in Canada* (Toronto: Anansi, 1980); J. Wilson & M. Tomlinson, *Wilson: Children and the Law*, 2d ed. (Toronto: Butterworths, 1986).

⁵ J. Wilson, *Wilson on Children and the Law* (Toronto: Butterworths, 1994) at iii, vii.

to headings, an index, and self-contained footnotes at the end of each sub-section.

A common thread through the work is the examination of rights issues. The Canadian government formally recognized children's rights at an international level in 1959 with the adoption of the United Nations *Declaration of the Rights of the Child*.⁶ Canada signed the United Nations *Convention on the Rights of the Child*⁷ in 1990, which will be ratified once federal, provincial and territorial laws comply with the obligations set out in the Convention. A Table comparing the provisions of *Canadian Charter of Rights and Freedoms* (hereinafter the *Charter*).⁸ and international law⁹ highlights the difficulties in the use of language and the concomitant interpretation difficulties in domestic law. These difficulties are reinforced by a series of as yet unanswerable questions¹⁰ about the actual rights of the child. Although there are no reported cases where international covenants have been applied to interpret the *Charter* or domestic law in children's matters, it is Wilson's view that international law should be incorporated into rights advocacy because of the potential impact on interpretation.¹¹

Wilson highlights one of the central concerns when he states that children's rights are equal to their adult counterparts only when they are alleged to have committed crimes.¹² The otherwise special status of the child is addressed in discussions about the child as witness, the legal representation of the child, and the restrictions on the child's civil participation, impacting on, *inter alia*, the capacity to contract, the capacity to consent to treatment, the capacity to make a will, restrictions on receiving inheritances, and restrictions in employment.

Although there is little jurisprudence on the child as immigrant, the subject is a fascinating illustration of the dilemmas surrounding the status of children and a clear example of where children are not accorded the same rights as adults. Children are not recognized in

⁶ *Declaration of the Right of the Child*, UN General Assembly Resolution 1386 [XIV].

⁷ *Convention on the Rights of the Child*, UKTS 44 (1992).

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁹ *Supra* note 5 at 1.22-1.23.

¹⁰ *Supra* note 5 at 1.21-1.25.

¹¹ *Supra* note 5 at 1.2-1.3.

¹² *Supra* note 5 at 5.1.

the immigration or refugee process as having special interests that need to be addressed, and children do not receive any special consideration. In fact, Wilson notes that the child may be subject to an assumption that a parent or relative whom the child is applying to visit will seek to have the child remain in Canada and consequently a visitor's permit may be refused. Given the restrictive approach taken by courts in immigration matters, the child as immigrant will no doubt have difficulty redressing this compromised status.

When presenting family law—the law of custody, access, and adoption—Wilson is practical enough to acknowledge the crucial role of tactics, particularly given the much-discussed difficulties in interpreting the best interests of the child. He reminds practitioners of the disparate, often sexist, views of judges and notes the absence of legislative focus on a child's racial or cultural heritage. He devotes an entire section to the so-called law of tactics. Wilson highlights the need to know the judge's views and personal and professional background. The importance of knowing the assessor and his or her methodology, which is never value-free, as well as examining the parent's motives and predisposition, if any, to influencing children, including making false allegations of abuse, or using violence as a means to force removal of a parent from a home, is examined. Economic implications of actions are also considered. Although at times the cynical voice of a practicing lawyer surfaces,¹³ it is refreshing to see these realities acknowledged in a written work.

As any family lawyer is aware, this area of law goes well beyond doctrinal study and in most cases a working understanding of child and family dynamics is a pre-requisite to adequate representation of a client. Contemporary issues such as discrimination against homosexual couples and arranging access for parents diagnosed as HIV positive are put into the context of family law problems with a focus on resolutions within the existing legal framework. This approach is also used in relation to child protection laws, clarifying legislation that is often confusing and illuminating a bureaucracy that can be equally opaque. Wilson does not shy away from discussing psychology, for example, entering into a discussion about the parent alienation syndrome or of the psychological parent and the bonding principle. In addition, useful references are provided.

¹³ See, for example, the references to "unnecessarily proselytizing professionals," *ibid.* at 2.50; the "ineptness of an adequate response" in relation to abduction and enforcement of custody orders, *ibid.* at 2.55.

Predictably, one of the major sections covers the financial support of children. Unfortunately, there is no full discussion of the policy and issues contributing to the "childrenization" of poverty,¹⁴ a matter of increasing concern in Canada. Wilson is content to quote the statistics and provide a methodical approach to the calculation of child support, including a useful appendix dealing with incorporating cost of living increases in draft awards.

At first glance the section on Children and Education is a curious inclusion. In fact, it is an area fraught with potential *Charter* issues as an attempt is made to balance the notion of adult supervision and control and children's rights. A detailed discussion of corporal punishment illustrates the inconsistencies arising from the attempt to reconcile a school board's decision-making with provincial legislation and *Charter* guarantees. Similarly, the rights and responsibilities of freedom of expression, covering a range of matters from student dress to political statements, have not resulted in any clear law, with the case law traversing unpredictably through recognition of school board powers to discipline children in some cases to findings of *Charter* violations in others.

Wilson has met his objective of providing a practical service to reference the myriad of cases, legislation and literature pertaining to children and the law. Detracting slightly from the usefulness of the service, mainly Ontario legislation and case law are used, although one assumes that over time other jurisdictions will be included to provide the desired comprehensive work.

¹⁴ This term is borrowed from Mary Tomlinson, *ibid.* at 4.3